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ATTORNEYS AT LAW

August 14, 2012

VIA HAND DELIVERY

The Honorable Katherine B. Forrest
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 8/20/12
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Re: **Microsoft Corporation v. DataTern, Inc.**
No. 11-cv-2365-KBF
SAP AG and SAP America, Inc. v. DataTern, Inc.
No. 11-cv-2648-KBF

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Dear Judge Forrest:

DataTern, Inc. ("DataTern") respectfully requests a conference, pursuant to 1.E and 2.F of the Court's Individual Practices and Local Rule 37.2 to discuss a motion to compel and an extension of the discovery schedule in the form of the following relief: an order requiring Microsoft Corporation ("Microsoft") (i) to produce immediately and to certify to the Court that it has produced all of its financial and related documents to DataTern, (ii) to suspend all damages depositions until seven business days following such certification so that DataTern can have a reasonable amount of time to confirm production, and (iii) to extend the period for completion of damages depositions for three weeks thereafter. DataTern does not at this time seek other changes in the Court's scheduling order as it relates to the issues of infringement or validity. The grounds for this request are the same as those set forth in DataTern's request regarding SAP, as both Microsoft and SAP are employing the same tactic of providing large volumes of documents late, just before critical events, or not at all. This case should be decided on its merits, not on the basis of well-rehearsed tactics by Plaintiffs. Given the continuance of such tactics in the face of this Court's order of July 11, 2012 and the unreasonable and costly burden upon DataTern and its counsel of repetitive document searches and depositions, DataTern respectfully requests that the Court grant this relief.

Since the beginning of July, Microsoft has produced over 1,365,324 pages of documents and, overall, in excess of 1.8 million pages. Excluded from that page count are hundreds of spreadsheet supposedly produced in native format but that do not have formulas within the cells blocks or references. Each spreadsheet is marked with a single bates number but is often hundreds of pages long.

Despite the volume of documents, fundamental financial or survey information directed toward the *Georgia-Pacific* factors remain unproduced. Microsoft's infringing products include products commonly referred to as ADO.NET, Entity Frameworks, LINQ to SQL and Visual Studios. All products are distributed by themselves or as part other products including Visual Studios. DataTern believes, and therefore asserts, that:

- in Microsoft's data access stack, Entity Framework sits on top of and utilizes ADO.NET to access data from an relational database;

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- ADO.NET has been distributed with Windows since Windows XP;
- Entity Framework has been distributed with Windows since shortly after its release;
- ADO.NET, Entity Framework, LINQ to SQL have been distributed with Visual Studios, in large part for free, to Developers, Independent Software Vendors ("ISVs"), Value Added Resellers ("VARs") and System Integrators ("SIs") as part of Microsoft's strategy to pull through its platform and other Microsoft products;
- ADO.NET and Entity Framework are the principle means by which access is provided to business users to Microsoft's relational database known generically as SQL Server; and
- Since April 2011, Microsoft has begun providing a service known as Azure SQL Server, which provides business users with access to a Microsoft relational database in the "Cloud".

Depositions are on-going in New York. On August 9th, DataTern learned that on August 8th, Microsoft overnighted certain financial records to Boston regarding Windows. Such documents were received too late for use during today's deposition. Knowing that the deposition of Microsoft's 30(b)(6) designee Shawn Nandi was to occur in New York City on August 10, 2012, on August 9, 2012, Microsoft overnighted new Shawn Nandi documents to McCarter's Boston office which were not received until midday, too late to be used in the deposition. This pattern of conduct was followed by Microsoft attempting to add additional Rule 30(b)(6) topics during Mr. Nandi's deposition.

Despite the quantity of documents produced, basic information has been omitted. For example, while Microsoft has said that it will produce the number of windows units sold with ADO.Net and annual income statements, it did not. It refuses to do so for SQL Server or Azure SQL Server. Microsoft has produced limited financial information in the form of reports prepared specifically for this litigation, called Pivot Tables. The information is incomplete. Taking Visual Studios, as an example, Microsoft has produced "Pivot Tables" for Visual Studios for Jan. 2006 – April 2012. But, the Pivot Tables include only gross sales and only reports such sales for the category "Distributor, Reseller Only" excluding sales connected to other licensing programs. Mr. Nandi has testified that Microsoft tracks profit and costs for each product or convoy product, (which Microsoft has not produced with one exception described below), and scorecards for each product and category of user. Microsoft has not produced such scorecards, income statements, or other documents that evidence direct material, direct labor, manufacturing overhead, research and development costs, advertising and promotional costs, returns, discount allowances or policies, and net sales for the relevant products and services, and royalties paid by Microsoft for any comparable licenses.

Microsoft's marketing strategy is "developer, developer, developer" in order to "pull through its platform".¹ As part of that strategy, Microsoft distributes for free basic versions of Visual Studios as well as LINQ to SQL, ADO.Net and Entity Framework. Microsoft requires a click-through license for each online distribution and DataTern

¹ Microsoft has produced powerpoint slides showing platform pull through and revenues for 2005 but not any study or data for prior or subsequent years.

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believes that all distributed free versions are similarly licensed or tracked by Microsoft. Microsoft has provided some, but not all of, the requested data on infringing products distributed for free.

A study conducted by Microsoft of Data Access and ORM Markets in November, 2004, admits: "*Microsoft currently relies on third-party partners to supply products for OR mapping. 'We don't have a product shipping right now, but we have had betas and we've released test copies of products that show that the direction we're going is deep integration between the production environment and the relational data storage world.'*"² Although requested, Microsoft has not produced any of its licenses with third-party partners or any comparable licenses for such technology. Microsoft did produce, at a deposition, a computation of Microsoft's development costs (without backup) that Mr. David Campbell, the Microsoft Technical Fellow directing the study, admitted was only a rough estimate, prepared in one day, from Microsoft's data on employee costs ("FTEs") in one day—*i.e.* the cost data Microsoft has not produced. Microsoft has not produced any documents that show the cost or its efforts to develop the ORM betas being tested. Search of the web reveals a Microsoft project "ObjectSpaces" (similar in name to the Ontos/Firestar product ObjectSpark) that was in beta at about the time of this survey and that was never released.³

Microsoft has produced a worksheet which shows that Microsoft conducts systematic surveys of its products, their usage, percentage of market, importance, etc., including the very products involved in this case. Yet, it has not produced any survey that shows (i) what percentage of Window users are business users and what percentage use Windows to access relational databases and therefore employ ADO.Net and Entity Frameworks or (ii) what portion of Microsoft's installed software is for relational databases, the size of those clients and whether they utilize the Windows platform as well. These critical categories of information have not yet been produced and are prejudicing DataTern's defense and prosecution of this matter.

For all of the foregoing reasons, DataTern seeks a conference pursuant to Rule 37.2 and is prepared to file a motion to compel with respect to the documents at issue and the relief requested above.

Respectfully,


William A. Zucker

WAZ/jrg

cc: Counsel for Microsoft and SAP.

² Emphasis added. Microsoft Study, Bates # MSDT 1389428.

³ See, e.g., <http://www.universalthread.com/ViewPageArticle.aspx?ID=351>